The Class Action Unfairness Act (S. 5): Stacking the Deck Against Injured Americans

Legislative Report of the
House Judiciary Committee Democratic Staff

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INTRODUCTION

This week, the House is expected to take up S. 5, the so-called "Class Action Fairness Act of 2005." The Senate passed this legislation on February 10, 2005 with no amendments. The legislation differs from the many versions the House has taken up in the past[1] Although the bill is described by its proponents as a simple procedural fix, in actuality represents a major rewrite of the class action rules that would bar most forms of state class actions.

Legislation such as S. 5 is opposed by both the state[2] and federal[3] judiciaries; the National

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[1]S. 5 is the fifth time class action legislation has been offered in Congress. During the 105th Congress, the Full Committee marked-up and reported out on a party line vote the "Class Action Jurisdiction Act of 1998." The bill, however, was never considered by the Full House during the 105th Congress. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15-12 vote, the "Interstate Class Action Jurisdiction Act of 1999." On September 23, 1999 the House passed the legislation 222-207. It was never voted on in the Senate. During the 106th Congress, the House passed H.R. 2341, the "Class Action Fairness Act of 2001," by a vote of 233 to 190. While the Senate Judiciary Committee held a hearing on the bill, it did not take any further action. Finally, in 2003 H.R. 1115 passed the Judiciary Committee after hearing and mark-up and passed on the floor by a vote of 253-170. The Senate considered its own version of the legislation but it was never agreed to by the full Senate.

S. 5 differs in many respects with H.R. 1115, the most recent House-passed version of this bill. The bill removes some of the most egregious provisions, such as the provision allowing immediate interlocutory appeals of denials of class action certification, and a stay of all discovery while the appeal was pending. H.R. 1115 also contained a provision, added during the House Judiciary markup, that broadens the application of the legislation to both civil cases commenced on or after the enactment date and to civil actions commenced before the enactment date but certified on or after the enactment date. S. 5 is not retroactive and thus does not apply to pending cases.

[2]*See* Letter from Annice M. Wagner, President, Conference of Chief Justices (March 28, 2002) (on file with the minority staff of the House Judiciary Committee) [hereinafter Conference of Chief Justices letter] (calling the bill "an unwarranted incursion on the principles of judicial federalism.").

[3]*See* Letter from Leonias Ralph Mecham, Secretary, Judicial Conference of the United States (March 26, 2003) [hereinafter "Mecham letter"] (stating the conference's continued opposition to this legislation); Letter from Anthony J. Scirica, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States [hereinafter Scirica letter] (requesting that the Judiciary Committee withdraw provisions of the bill because they conflict with current rules of

Council of State Legislatures, consumer and public interest groups, including Public Citizen,[4] the Consumer Federation of America,[5] Consumers Union, and U.S. PIRG; a coalition of environmental advocates; health advocates, including the Campaign for Tobacco Free Kids[6]; civil rights groups, such as Alliance for Justice, Leadership Conference on Civil Rights, the NAACP and Lawyers' Committee for Civil Rights, and labor groups, such as the AFL-CIO.[7]

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practice and procedure) (letters on file with the minority staff of the House Judiciary Committee).

[4]See Publication from Public Citizen (January 25, 2005)(on file with the minority staff of the House Judiciary Committee).

[5]See Letter from Rachel Weintraub, Assitant General Counsel, Consumer Federaion of America (February 14, 2005){hereinafter CFA letter].

[6]See Letter from Consumers Groups, including but not limited to, Consumers Union, U.S. PIRG, Campaign for Tobacco Free Kids, American Association of People with Disabilities, and others (February 15, 2005)[hereinafter Consumer Group Letter].

[7]See Letter from Civil Rights and Labor Organizations, including but not limited to, Alliance for Justice, Leadership Conference on Civil Rights, AARP, AFL-CIO, American-Arab Anti-Discrimination, American Association of People with Disabilities, American Association of University Women, American Civil Liberties Union, American Federation for the Blind, American Federation of Government Employees, American Federation of School Administrators, American Federation of State, County & Municipal Employees, American Federation of Teachers, American Jewish Committee Americans for Democratic Action, The Arc of the United States, Association of Flight Attendants, Bazelon Center for Mental Health Law, Center for Justice and Democracy, Coalition of Black Trade Unionists, Communications Workers of America, Consortium for Citizens with Disabilities Civil Rights Task Force, Department for Professional Employees, AFL-CIO Disability Rights Education and Defense Fund, Epilepsy Foundation, Federally Employed Women, Federally Employed Women's Legal & Education Fund, Inc., Food & Allied Service Trades Department, AFL-CIO, Human Rights Campaign, International Association of Machinists and Aerospace Workers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, International Brotherhood of Electrical Workers, International Brotherhood of Teamsters, International Federation of Professional & Technical Engineers, International Union of Bricklayers and Allied Craftworkers, International Union of Painters and Allied Trades of the United States and Canada, International Union, United Automobile, Aerospace & Agricultural Workers of America, Jewish Labor Committee, Lawyers' Committee for Civil Rights Under Law, Legal Momentum, Mexican American Legal Defense and Educational Fund, NAACP, NAACP Legal Defense & Educational Fund, Inc., National Alliance of Postal and Federal Employees, National Asian Pacific American Legal Consortium, National Association for Equal Opportunity in Higher Education, National Association of Protection and Advocacy Systems, National Association of Social Workers, National Employment Lawyers Association, National Fair Housing Alliance, National

The legislation is also opposed by some of the nation's most prestigious editorial boards.[8] Just last weekend, the *New York Times* Editorial board wrote of the bill:

> Instead of narrowly focusing on real abuses of the system, the measure reconfigures the civil justice system to achieve a significant rollback of corporate accountability and people's rights. The main impact of the bill - which has the sort of propagandistic title normally assigned to such laws, the Class Action Fairness Act - will be to funnel nearly all major class-action lawsuits out of state courts and into already overburdened federal courts. That will inevitably make it harder for Americans to pursue legitimate claims successfully against companies that violate state consumer, health, civil rights and environmental protection laws.[9]

By providing plaintiffs access to the courts in cases where a defendant may have caused small injuries to a large number of persons, class action procedures have traditionally offered a valuable mechanism for aggregating small claims that otherwise might not warrant individual litigation. This legislation will undercut that important principle by making it far more burdensome, expensive, and time-consuming for groups of injured persons to obtain access to justice. Thus, it would be more difficult to protect our citizens against violations of fraud, consumer health and safety, and environmental laws. The legislation goes so far as to prevent state courts from considering class action cases that involve solely violations of state laws, such as state consumer protection laws.

Organization for Women, National Partnership for Women and Families, National Women's Law Center, Paper, Allied-Industrial, Chemical and Energy Workers International Union, Paralyzed Veterans of America, People For the American Way, Pride At Work, AFL-CIO, Service Employees International Union, Transport Workers Union of America, Transportation Communications International Union, UAW, Unitarian Universalist Association of Congregations, UNITE!, United Cerebral Palsy, United Food and Commercial Workers International Union, United Steelworkers of America, Utility Worker Union of America, Women Employed (February 2, 2005) [hereinafter Civil Rights and Labor Groups Letter].

[8]*See e.g.* "The Class Action Unfairness Act," Editorial, *New York Times*, April 25, 2003; "Unfair Federal Fairness Act," Editorial, *Milwaukee Journal Sentinel*, April 10, 2003; "Threat to Class Actions," Editorial, *Los Angeles Times*, April 9, 2003; "Courts and torts: Citizens' rights suffer if Congress sends all class-action suits to federal court," Editorial, *Philadelphia Inquirer*, May 16, 2003; "Dubious Class Actions, " Editorial, *Salt Lake Tribune*, May 12, 2003; "'Fairness' to Whom? Congress Intrudes on State Prerogatives in Class-action bill," Editorial, *Columbus Dispatch*, May 8, 2003; "DECLASSE: Nominal Conservatives Assault Onmce Cherished Federalism," Editorial, *Houston Chronicle*, April 29, 2003; and "Class Action Unfairness," Editorial, *Palm Beach Post*, May 15, 2003.

[9]Editorial, *A Dismal Class-Action Finale*, N.Y. Times, Feb. 12, 2005.

As Consumers Union has written, "[T]his legislation will deny consumers adequate relief when they are defrauded, injured or otherwise harmed. [D]espite its name, we believe that the bill is unfair to consumers [and that] class actions have worked well for consumers and those instances far outweigh the problem cases."[10]

Corporate America agrees. Bonnie Herzog, Citigroup Analyst, recently stated that the "practical effect of the change could be that many cases will never be heard given how overburdened federal judges are, which might help limit the number of cases. . . .[T]his news is positive in general for the tobacco industry . . ."[11] And a recent article on Forbes.com stated the following:

> This legislation will shift most future class actions to federal from state courts. This is expected to make it more difficult for plaintiffs to prevail, since in general, federal courts are perceived to be less open to considering spurious class-action claims. Moreover, various judicial precedents restrict the ability of federal courts to hear claims that involve applying the laws of different states. In addition, already overcrowded federal dockets will also weigh against class-action claims being considered.[12]

Description of the Legislation

Section 1 contains the short title and Section 2 contains findings and purposes.

Section 3 of the legislation is the so-called "consumer bill of rights." It includes a new sec. 1712 of Title 28 of the U.S. Code, regarding coupon settlements, and specifies that if a proposed settlement provides for the recovery of coupons to a class member in a contingency fee case, the attorneys's fee for such award can only be based on the value to class members of the coupons that are redeemed.[13] If the attorneys' fee is not a contingency fee and the proposed settlement provides for a recovery of coupons but the attorneys' fee is not based on the coupon, the fee award will be based on the amount of time the attorney reasonably expended working on the action.[14] The court must approve this kind of fee award.[15] If the settlement provides for a

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[10]*See* Consumers Union Letter.

[11]Email from Bonnie Herzog, Managing Director, Smith Barney, Feb. 10, 2005.

[12]Oxford Analytica, *Class-Action Breakthrough*, Forbes.com, Feb. 11, 2005.

[13]S. 5, §3(a), proposed Sec. 1712(a).

[14]S. 5, §3(a), proposed Sec. 1712(b).

[15]*Id.*

mixture of coupons and equitable relief (including injunctive relief), the attorneys' fee is determined by both measures provided in the bill for calculating the fee.[16] Courts may employ experts to determine the value of a coupon, and courts must scrutinize any coupon settlements and make written findings that they are adequate and fair.

Section 3's proposed Section 1713 provides for court approval of proposed settlements where any class member is obligated to pay sums to class counsel that would result in a net loss to the class member. The court may approve such a settlement only after making a written finding that the nonmonetary benefits to the class member substantially outweigh the monetary loss.[17] Proposed Section 1714 provides that courts may not approve settlements in which some class members receive greater sums than others solely on the basis of geographic proximity to the court.[18]

Finally, proposed Section 1715 provides a detailed notice requirement of settlements to each state official of each state in which a class member resides, and appropriate federal officials. The notice must contain a copy of the complaint and corresponding materials, notice of any scheduled hearings, any proposed or final notifications to class members of members' rights, any proposed or final settlements, any agreements made between class counsel and defendants' counsel, any final judgment or dismissals, names of class members and their share of the claims, and any written judicial opinions in the case.[19] This section also details how to give notice if the defendant is a federal or state depository institution. Finally, this section specifies that a court may not give a final approval of a proposed settlement before 90 days after notification was served.[20]

Section 4 of the legislation is the core operative provision. It provides for the removal of state class action claims involving 100 or more plaintiffs to federal court in cases involving violations of state law where the amount in controversy exceeds $5 million and any member of the plaintiff class is a citizen of a different state than any defendant.[21] Thus, a class action

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[16]S. 5, §3(a), proposed Sec. 1712(c).

[17]S. 5, §3(a), proposed Sec. 1713.

[18]S. 5, §3(a), proposed Sec. 1714.

[19]S. 5, §3(a), proposed Sec. 1715.

[20]S. 5, §3(a), proposed Sec. 1715(d).

[21]28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a). Current law requires there to be complete diversity before a state law case is eligible for removal to federal court, that is to say that all of the plaintiffs must be citizens residing in different states than all of the defendants. *See Stawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). In *Snyder v. Harris*, 394 U.S. 332 (1969),

brought in state court by that state's citizens, using only that state's laws against a company that has substantial business in that state, will be removed to federal court if the company was headquartered or incorporated in another state.[22]

There are few exceptions provided in S. 5 where the federal courts are directed to abstain from hearing a class action. First, the court must decline jurisdiction when greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed; at least one defendant, from whom significant relief is sought and whose conduct forms a significant basis for the claims, is also a citizen of that state; and the principal injuries resulting from the alleged conduct were incurred in that state, so long as no other similar class action against any of the defendants has been filed during the three-year period preceding the filing.[23] Second, the court must abstain from hearing the action if two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state where the action was originally filed.[24]

The jurisdictional provisions of this bill do not apply if the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief. The legislation also excludes federal securities-related and corporate governance class actions from coverage.

The district court may decline jurisdiction and abstain from hearing the class action if greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed. In making this decision, the district court should consider factors such as whether the claims involve matters of national or interstate interest; whether the claims are governed by laws of the state where the action was originally filed or by the laws of another state;

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the Supreme Court held that the court should only consider the citizenship of named plaintiffs for diversity purposes, and not the citizenship of absent class members.

[22]Prof. Arthur R. Miller of Harvard Law School, an internationally-recognized expert on civil procedure, commented on this aspect of the legislation in a letter to Congress as follows:

> This radical departure from longstanding principles of federalism is a particular affront to state judges when we consider the unquestioned vitality and competence of state courts to which we have historically and frequently entrusted the enforcement of federally created rights. Indeed, the Supreme Court has often expressed faith in the state courts.

Letter from Arthur R. Miller to Sen. John Breaux, October 20, 2003.

[23] 28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a)(4)(A).

[24]28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a)(4)(B).

whether the action was pleaded in a way to avoid federal jurisdiction; whether the action was filed in a forum with a distinct nexus to the class members, alleged harm, or defendants; whether the number of citizens of the state where the action was filed is substantially larger than the number of citizens from any other state; and whether, during the 3-year period preceding the filing, one or more other class actions asserting the same claims on behalf of the same persons have been filed.[25]

Section 4 of the bill also specifies that certain actions which are not currently considered class actions – namely so-called "mass actions" – will be treated as class actions for purposes of the bill, and thus preempted from state courts as well.[26] In the bill, "mass actions" are defined as any civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the claims involve common questions of law or fact.[27] The $5,000,000 amount in controversy provision applies, and "mass actions" are subject to the same exceptions described above.

Section 5 of the bill includes a series of new rules for removing so-called interstate class actions to federal court. It provides that a class action may be removed to district court without regard to whether any defendant is a citizen of the state in which the action is brought. The action may be removed by any defendant without consent of the other defendants, and the 1-year limitation period applicable to any case removed to federal court does not apply.[28] The bill also changes the law with respect to remand, providing that an appellate court may accept an appeal from a district court granting or denying a motion to remand, if application is made to the appellate court after 7 days of entry of the order. The appellate court must complete all action on the appeal within 60 days after the date the appeal was filed, except that a 60 day extension may be granted if all parties agree to the extension or the extension is for good cause and not to exceed ten days.[29]

Section 6 of the bill provides for a judicial conference report on class actions which contains recommendations on best practices for courts to use to ensure fairness to class members, that fees and expenses awarded to counsel correspond to outcome for members and the time, expense and risk associated with the litigation, and that class members on whose benefit the

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[25]28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a)(3).

[26]28 U.S.C. § 1332(d)(2), as amended by S. 5, §4(a)(11).

[27]*Id.*

[28]S. 5, §5(a), proposed Sec. 1453(b).

[29]S. 5, §3(a), proposed Sec. 1453(c).

settlement is proposed are the primary beneficiaries of the settlement.[30]

Section 7 enacts the amendments to rule 23 of the Federal Rules of Civil Procedure, set forth in the March 27, 2003 order by the Supreme Court.[31] Section 8 of the bill specifies that the Act does not restrict the rulemaking authority of the Judicial Conference and the Supreme Court.[32] Section 9 of the bill states that the Act shall apply to any civil action commenced on or after the date of enactment.[33]

S. 5 will damage both the federal and state courts. As a result of Congress' increasing propensity to federalize state crimes, the federal courts are already facing a dangerous workload crisis. S. 5 will inevitably result in substantial delay before civil class action claimants are able to obtain a trial date in federal court. Given the backlog in the federal courts and the fact that the federal courts are obligated to resolve criminal matters on an expedited basis before civil matters,[34] even when plaintiffs are able to successfully certify a class action in federal court, it will take longer to obtain a trial on the merits than it would in state court. By forcing resource intensive class actions into federal court, S. 5 will further aggravate these problems and cause victims to wait in line for as much as three years or more to obtain a trial.

This bill also gives corporate defendants – including defendants in corporate fraud and

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[30]S. 5, §6.

[31]S. 5, §7. In that Order, Rule 23 was amended to include the following provisions: (1) the court must determine by order whether to certify a class action; (2) the court may direct appropriate notice to class members; (3) the judgment, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class; (4) a class may be divided into subclasses; (5) the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class; (6) a court that certifies a class must appoint a class counsel; (7) an attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class; (8) the court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action; (9) a claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), a class member may object to the motion; and (10) the court may refer issues related to the amount of the award to a special master or to a magistrate judge. Fed. R. Civ. P. 23, as amended (U.S. Order, Mar. 27, 2003).

[32]S. 5, §8.

[33]S. 5, §9.

[34]Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (1994). One federal study shows that in federal courts, class actions take 2-3 times longer than civil cases and consumer almost 5 times more judicial time.

civil rights cases – a huge leg up in class action cases. The lessons learned from the Enron, Firestone, Dalkon Shield and other product liability and financial debacles show that our citizens need more legal protections against such wrongdoers, not less. Yet this bill takes us in precisely the opposite direction.

In addition, the legislation includes provisions that allow any defendant, without the consent of the other defendants, in a class action case to seek to remove to federal court, and that extend the time period for removal beyond that currently permitted. This means that any single party out of tens of thousands – conceivably even an employee of a defendant – could unilaterally seek to remove a case, throwing out thousands of hours or more of work that may have been spent pursuing a state claim. This again has the effect of making most efforts to obtain justice in state court simply too risky to pursue.

Consumers may also be disadvantaged by the vague terms used in the legislation. The terms "significant relief" from defendants and "significant basis" for claims asserted, and "primary defendants[35] are new and undefined phrases with no precedent in the United States Code or the case law. It will take many years and conflicting decisions before these critical terms are sorted out. The vagueness problems will be particularly acute for harmed victims—if they guess incorrectly regarding the meaning of a particular phrase, their class action could be permanently preempted and barred. However, if defendants guess wrong and jurisdiction does not lie in the federal courts, the defendants will be no worse off than they are under present law, but rather will have benefitted from the additional time delays caused by the failed removal motion.

The net result of these various changes is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or federal level. This means, as noted above, it will be far more difficult for consumers to bring class actions in state court involving violations of fraud, health and safety, and environmental laws.

I. S. 5 WILL ELIMINATES MANY CASES CONCERNING CONSUMER HEALTH AND SAFETY, THE ENVIRONMENT, CIVIL RIGHTS, AND PERSONAL INJURY

A. S. 5 Will Prevent Citizens of a State from Taking Advantage of Their Own State Court System

S. 5 will have a serious adverse impact on the ability of consumers and other harmed individuals to obtain compensation in cases involving widespread harm. At a minimum, the legislation will force most state class action claims into federal courts where it is likely to be far more expensive for plaintiffs to litigate cases and where defendants could force victims to travel long distances to attend proceedings.

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[35] S. 5, § 4.

By providing for the removal of state class action claims to federal court in cases involving violations of state law where the amount in controversy exceeds $5 million and any member of the plaintiff class is a citizen of a different state than any defendant, a class action brought in state court by that state's citizens, using only that state's laws against a company that has substantial business in that state, will be removed to federal court if the company was headquartered or incorporated in another state. In this day and age, the headquarters or place of incorporation of a company can be largely irrelevant to where that company has substantial numbers of employees or does substantial business.

Citizens of a state should be able to take advantage of their own state court system if the harm occurred to them in the state by a defendant company with substantial business ties to that state. The following are examples of important class actions previously brought at the state level, but which could have been forced into federal court under S. 5, where the actions may be delayed or rejected:

- In the Baptist Foundation of Arizona case, a mirror image of the Enron scandal, the Foundation issued worthless notes and sold them in many Arizona communities. Approximately 13,00 investors in Baptist Foundation of Arizona case loss millions of dollars in this scheme in "off the books" transactions with sham companies that were controlled by the Foundation and corporate insiders. As it was, the victims were able to bring a successful state class action suit against Arthur Anderson which resulted in a $217 million settlement. If S. 5 was law, this case would have been forced into federal court because the legislation provides no exemption for state securities claims.[36]

- Foodmaker Inc., a Delaware corporation and the parent company of Jack-in-the-Box restaurants, agreed to pay $14 million in a state class-action settlement involving a violation of Washington's negligence law. The class included 500 people, mostly children and Washington residents, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli 0157:H7 bacteria. The victims suffered from a wide range of illnesses, from more benign sicknesses to those that required kidney dialysis. Three children died.[37]

- Equitable Life Assurance Company, an Iowa corporation, agreed to a $20 million settlement of two class-action lawsuits involving 130,000 persons filed in Pennsylvania and Arizona state courts. The class action alleged that Equitable misled consumers, in violation of state insurance fraud law, when trying to sell "vanishing premium" life

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[36]Craig Harris, *Andersen settles Baptist Suit,* azcentral.com (March 2, 2002), http://www.arizonarepublic.com; *Settlement Sum Revives Hope for Baptist Investors: Andersen to pay $217 million* (March 3, 2002)http://www.arizonarepublic.com.

[37] The settlement was approved on 25 September 1996 in King County, Washington Superior Court. "Last Jack in the Box Suit Settled," *Seattle Times*, October 30, 1997 at B3.

insurance policies in the 1980s. Equitable sold the policies when interest rates were high, informing potential customers that after a few years, once the interest generated by their premiums was sufficiently high, their premium obligations would be terminated. However, when interest rates dropped, customers ended up having to continue to pay the premium in full.[38]

- On July 26, 1993, a California plant operated by General Chemical, a Delaware corporation with offices in New Jersey, erupted leading to a hazardous pollution cloud when a valve malfunctioned during the unloading of a railroad tank car filled with Oleum, a sulfuric acid compound. The cloud settled directly over North Richmond, California, a heavily-populated community, resulting in over 24,000 residents needing medical attention. General Chemical entered into a settlement for violation of California negligence law with 60,000 North Richmond residents who were injured or sought treatment for the effects of the cloud, or were forced to evacuate their homes. Individual plaintiffs received up to $3,500 in compensation.[39]

- In Louisiana, the use of the pesticide Fipronil led to a wide-spread crawfish kill, wiping out the livelihood of many Louisiana fishermen, and causing Louisiana's crawfish production to fall from 41 million pounds in 1999 to 16 million pounds in 2000. Crawfish farmers filed a class action against Bayer CropScience LP, an out-of-state corporation and manufacturer of the pesticide. They also named as defendants smaller, in-state seed companies who used the pesticide. The plaintiff class members consisted of individual farmers and Louisiana-based farming businesses. A Louisiana state court judge recently granted final approval of a settlement agreement. The in-state seed companies were ultimately indemnified by Bayer, the main manufacturer, from whom the significant relief was sought. The class of plaintiffs was made of up entirely of current or former Louisiana residents and all of the crawfish infection occurred in Louisiana. This case would have been removed to federal court under this legislation.

- On April 21, 1999, Nationwide entered into a state class action settlement concerning a redlining discrimination claim with the Toledo, Ohio Fair Housing Center. The lawsuit had been brought in Ohio state court by residents living in Toledo's predominately black neighborhoods, and charged that Nationwide redlined African-American neighborhoods by discouraging homeowners in minority neighborhoods from buying insurance and by denying coverage to houses under a certain value or a certain age. As a result of the settlement, Nationwide agreed to modify its underwriting criteria, increase its agency

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[38]*See* David Elbert, "Lawsuits to Cost Equitable $20 Mill," *Des Moines Register*, July 19, 1997 at 12 and "Cost of Settling Lawsuits Pulls Equitable Earnings Down," *Des Moines Register,* August 6, 1997 at 10.

[39]*See* Mealey's Litigation Reports: *Toxic Torts, $180 Million Settlement of Toxic Cloud Claims Wins Judges O.K.,* November 17, 1995 at 8.

presence, step up its marketing in Toledo's black neighborhoods. Nationwide also agreed to place up to $2 million in an interest-bearing account to provide compensation to qualified class members, and agreed to deposit $500,000 with a bank willing to offer low-interest loans to residents buying homes in Toledo's black neighborhoods.[40]

- Under current law, class action claims against managed care must often distinguish between ERISA and non-ERISA patients. Non-ERISA patients have a full range of remedies available to them under state law. On the other hand, ERISA patients have a very limited set of remedies—the cost of the benefit denied, which in most cases is woefully inadequate. The managed care reform debate in Congress includes the elimination of the ERISA preemption which would allow patients who receive their health care from their employer to hold their HMO accountable if it denies care. However, legislation such as S. 5 would move in the opposite direction by enacting legislation which would deny more patients access to justice in state court.[41]

- The regulation of funeral homes, cemeteries and crematoria should remain an issue best handled by state courts. However, federalizing of such class actions under this bill likely would force these families to travel untold miles from their homes – in some cases into entirely different states – just to exercise their legal rights. For example, the largest operator of funeral homes in the United States is the defendant in a state class action in Florida accuses Services Corporation International, a Texas Corporation and owner of Menorah Gardens, of breaking open burial vaults and dumping the remains in a wooded area, crushing vaults to make room for others, mixing body parts from different individuals, and digging up and reburying remains in locations other than the plots purchased.[42] Similarly, in Georgia, Tri-State Crematory failed to cremate bodies and

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[40]*See* Toledo Fair Hous. Ctr. v. Nationwide Mut. Ins. Co., No CI93-1685, Ohio Comm. Pls, Lucas County; *see also* "Nationwide and Ohio Fairhousing Announce Attempt to Settle Class Action," *Mealey's Insurance Law Weekly*, April 27, 1998 at 3.

[41]One example is *Kaitlin v. Tremoglie, et al.*, No. 002703 (Pa. Comm. Pls., Philadelphia Co. 1997). On June 23, 1997, Harold Kaitlin filed a class action in Pennsylvania State court against his psychiatrist, David Tremoglie, and Keystone Health Plan East Inc., his HMO, alleging that thee psychiatrist had treated hundreds of patients without a medical license. The case was filed on behalf of himself and all other patients treated by Tremoglie at the Bustleton Guidance Center. The suit alleges that the class was treated by an unlicenced and fraudulent psychiatrist who unlawfully prescribed powerful medications not suitable for their illness and that the HMO failed to verify that Tremoglie was a licensed psychiatrist, failed to supervise him, and referred patients to him.

[42] Joel Engelhardt, *State Seeks Control of Menorah Gardens*, The Palm Beach Post, March 2, 2002 at 1A.

return remains to loved ones. Although the issues raised in this class action are clearly state issues, such a class action would be removable to federal court under S. 5.

B. Once in the Federal System, Multi-State Class Actions Involving State Consumer Protection Laws Will Be Less Likely to Be Certified and Will Have No Place to Go

It is likely to be far more difficult and time consuming to certify a class action in federal court. In 1999, fourteen states, representing approximately 29% of the nation's population, adopted different criteria for class action rules than Rule 23 of the Federal Rules of Civil Procedure.[43] In addition, with respect to those states that have enacted a counterpart to Rule 23, the federal courts are likely to represent a far more difficult forum for class certification to occur. This is because in recent years, a series of adverse federal precedent has made it more difficult to establish the predominance requirement of Rule 23(b)(3) to establish a class action under the Federal Rules.

Moreover, some federal courts will not certify class actions involving the laws of multiple states because of uncertainty regarding how to interpret current federal law. Currently, before a federal court will certify a multi-state class under Federal Rule of Civil Procedure 23(b)(3), plaintiffs must show that common questions of law predominate. The United States Supreme Court has held that in diversity cases, the federal district court must look to the choice of law rules of the state in which it sits.[44] State choice of law principles vary among states, but many provide that the court must apply the law of the home state of the plaintiff, or the law of the state where the harm occurred.

The Supreme Court addressed this issue in *Phillips Petroleum Co. v. Shutts*.[45] In *Shutts*, the Supreme Court held that one state's law may be applied to a multi-state class action as long as the law chosen is from a state that has "significant contacts" with the case and choosing that single law "is neither arbitrary nor fundamentally unfair."[46] However, no federal circuit court has certified a multi-state consumer class action, and certain federal courts, including the Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits, as well as twenty-six district court, have declined to apply *Shutts* and refused to certify multi-state class actions, even where

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[43] *See* Conference of Chief Justices letter, *supra*.

[44] *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941); *see also Griffin v. McCoach*, 313 U.S. 498, 503 (1941) (citing *Klaxon* and stating: "[W]e are of the view that the federal courts in diversity of citizenship cases are governed by the conflict of laws rules of the courts of the states in which they sit.").

[45] 472 U.S. 797 (1985).

[46] *Id*. at 818, 819.

choosing one state's law would be constitutionally permissible, because they deem the case too complex and unmanageable.[47]

Congress could have done something about this problem but chose not to. Senators Feinstein and Bingaman offered an amendment on the Senate floor that would have provided federal judges with an additional tool to manage multi-state class actions based on consumer laws. Under the amendment, the judge would have the option of bypassing complex state procedural choice-of-law rules, and instead apply one state's law that has a sufficient connection to the case to meet constitutional requirements. If the judge rejects this option, he or she may not deny class certification on the single ground that multiple state laws apply.

The amendment also would have allowed a judge, in the alternative, to use a "grouping" technique that would allow the federal court to certify a nationwide class if there are material differences in state laws, but would not allow denial of a multi-state class simply because of nuanced differences in state laws. Unfortunately, the Senate rejected this amendment by a vote of 61 to 38**.**

The rejection of this amendment show's the bill's true colors. If proponents wanted federal court review of lawsuits with national implications, they would not object to an amendment making clear that federal judges may not dismiss these cases. However, that is not the intent of the sponsors. Rather, it is clear the bill is designed to bury class action lawsuits, to cut off the one means by which individual Americans harmed by fraudulent or deceptive

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[47]*See, e.g.*, *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) (refusing to certify a nation-wide asbestos suit because the laws of multiple states would have to be applied, stating: "because we must apply an individualized choice of law analysis to each plaintiff's claims...the proliferation of disparate factual and legal issues is compounded exponentially. The states have different rules governing the whole range of issues raised by the plaintiffs' claims…"); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 310 (5th Cir. 2000) (refusing to certify the class because the plaintiffs, citizens of different states, could not prove that common questions of law predominated, as is required under Federal Rule 23, stating: "because the district court erred in its choice of law analysis, and thus abused its discretion on the issue of predominance under Rule 23(b)(3), we reverse the certification."); *In re: American Medical Systems, Inc., Pfizer, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (denying certification based on the problem presented by variances in state laws, noting that "if more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action…Plaintiffs failed to meet their burden of demonstrating predominance of common issues."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (refusing to certify a class action suit brought by owners of cars outfitted with tires that had abnormally high failure rates because the action would have to be governed by the laws of many states because the plaintiffs lived in different states).

practices can band together to demand justice from the responsible parties.

C. Mass Tort Actions Involving Personal Injury Will Be Treated As Class Actions Even Though They Are Individual Actions

Victims of mass torts will face particularly harsh obstacles. Mass torts are large-scale personal injury cases resulting from accidents, environmental disasters, or dangerous drugs that are widely sold. Asbestos is considered a mass tort. These personal injury claims are usually based on State laws, and almost every State has established rules of procedure allowing their State courts to customize the needs of their litigants in these complex cases.

In these cases, victims will typically have their own claims and their own individual representation. However, state courts may consolidate these claims for the sake of efficiency--for example, when there are a large number of individual claims brought by people who are injured by the same drug or device. As a result of such a consolidation, under S. 5, such victims would, if the tort involved victims from more than one state and the potential damages exceeded $5 million, find themselves prey to having their cases--cases they brought as individual actions--removed to federal court under the misnomer of "class actions."

Proponents of the bill invent a new term for these cases–"mass actions"–to make it appear they are an appropriate subject for inclusion in a class action bill. But a mass action is not a class action. In fact, the bill defines it as involving individual monetary claims brought by 100 or more persons. Most of these "mass actions" are really mass torts because they involve individual physical injury cases consolidated by the court for efficiency purposes.

An example of the type of case this provision would reach is Vioxx. In late September 2004, the pharmaceutical company Merck & Co. pulled its blockbuster pain medication Vioxx off the market. The largest prescription drug recall in history occurred as a result of a new study that showed that Vioxx doubled the risk of heart attack and stroke in some patients. With annual sales of $2.5 billion, Vioxx was one of the most successful new drugs ever. It was one of a new class of drugs called COX-2 inhibitors. Some 20 million Americans took Vioxx in the 5 ½ years it was sold, but we don't know how many thousands had heart attacks and strokes that could have been attributed to this drug. Since the discovery of the dangers of Vioxx, hundreds of cases from all over the country have been filed against Merck, and we can anticipate thousands more. A number these cases have been filed in state court in New Jersey and have been consolidated for discovery.[48] Some other examples include:

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[48] *See, e.g., In re: Vioxx Litigation*, Superior Court of New Jersey, Atlantic County: Law Division, Civil Action, Case Code Number 619. (Superior Court New Jersey 2004). State Vioxx cases have been filed New Jersey, Oklahoma, Maryland, Mississippi, Missouri and Texas. All the cases were removed to federal court and proceedings have been stayed in all pending the proceedings by the MDL panel. Decisions were not made as to whether jurisdiction was proper in federal court.

- Jane Huggins of Tennessee was a 39-year-old woman who died of a sudden heart attack after taking Vioxx. She was the mother of a 9-year-old son. When she was diagnosed with the early onset of rheumatoid arthritis, Vioxx was prescribed. She had no former cardiac problems or family history. According to her medical records, Mrs. Huggins was in, otherwise, excellent health. But on September 25, 2004, she died of a sudden heart attack--less than a month after she started taking Vioxx. She was buried on the very day in September that Merck took Vioxx off the market. Her husband filed suit against Merck in New Jersey, where the company is headquartered. In an interview on ``60 Minutes," Mr. Huggins said: ``I believe my wife would be here" if Merck had decided to take Vioxx off the market just 1 month earlier.

- Richard ``Dickie" Irvin of Florida was a 53-year-old former football coach, and president of the athletic booster association. He had received his college football scholarship and was inducted into the school's football hall of fame. He went on to play in the Canadian League Football until suffering a career-ending injury. Before that , he rarely went to see a doctor and had no major medical problems. In April 2001, Mr. Irvin was prescribed Vioxx for his football knee injury from years ago. Approximately 23 days after he began taking Vioxx, Mr. Irvin died from a sudden, unexpected heart attack. An autopsy revealed that his heart attack was caused by a sudden blood clot. This is the exact type of injury that has been associated with Vioxx use. Mr. Irvin and his wife of 31 years had four children and three grandchildren.

- John Newton of Texas, father of two, took Vioxx for osteoarthritis. On April 1, 2003, without warning, he began coughing violently and within minutes was coughing up blood. Before emergency medical services could be called, he collapsed in the arms of his 17-year-old son and died. It was later determined that Mr. Newton died of a blood clot in his lung. He had no prior history of blood clots, or pulmonary disease.

The cases go on and on in State after State. In many states, including California, New Jersey (where Merck is headquartered), New York, Pennsylvania, and Rhode Island, these types of claims are often consolidated by courts, often referred to the courts' special "mass torts courts" that are set up to expeditiously handle complex litigation. The mass torts court retains jurisdiction for the duration of the case. Under S. 5, these cases will be treated as class actions and sent to the federal courts, and companies like Merck will be let off the hook because once in federal court, the case mostly likely not get certified even though the series of mass tort cases were not even filed as a class action.

D. State Attorneys General Using State Consumer Protection Laws on Behalf of the Public Will Be Forced Into Federal Court Even Though They Are Not Class Actions

The legislation goes so far as to federalize all consumer protection actions, regardless of whether or not they involve large classes of nationwide plaintiffs, or even a class of plaintiffs at all. State Attorneys General often bring actions against defendants who have caused harm to the state's citizens. They do this under their state consumer protection and antitrust statutes, often with the Attorney General acting as the class representative for the consumers of the state.

S. 5 includes these State Attorney General lawsuits, thus throwing them into federal court and interfering with the state's ability to enforce its own laws. Fourteen state attorneys general have written a letter opposing this aspect of the legislation.[49] They stated:

> We are concerned that certain provisions of S.5 might be misinterpreted to impede the ability of the Attorneys General to bring such actions, thereby interfering with one means of protecting our citizens from unlawful activity and its resulting harm. That Attorney General enforcement actions should proceed unimpeded is important to all our constituents, but most significantly to our senior citizens living on fixed incomes and the working poor. S.5 therefore should be amended to clarify that it does not apply to actions brought by any State Attorney General on behalf of his or her respective state or its citizens.[50]

While the Senate had a chance to accept an amendment to alleviate this concern, it choose instead to rejected the amendment offered by Senator Pryor.

The net result of these various changes is that under the legislation it will be far more difficult for consumers and other harmed individuals to obtain justice in class action cases at the state or federal level. This means, as noted above, it will be far more difficult for consumers to bring class actions in state court involving violations of fraud, health and safety, and environmental laws.[51]

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[49] *See* Feb. 7, 2005 State AG letter, *supra*.

[50] *Id*.

[51] The following are two examples of cases that could be brought by state attorneys general. In Washington state, the parent company of Jack-in-the-Box restaurants agreed to pay $14 million in a class-action settlement. The class included 500 people, mostly children, who became sick in early 1993 after eating undercooked hamburgers tainted with E. coli bacteria. The Washington Superior Court in King County approved the settlement on September 25, 1996.

Another example of a state class action that could be filed by a state attorney general is a case in Richmond, California. On July 26, 1993, a railroad tank car filled with Oleum, a sulfuric

E. S. 5 Will Harm Workers By Making It Difficult to Enforce Civil and Labor Rights

S. 5 will make it extremely difficult for workers to redress wage and hour and civil rights violations. As the Lawyers Committee for Civil Rights under the Law observed, "[t]he consequences of the [legislation] for class action practice in the federal courts would be astounding and, in our view, disastrous. Redirecting state law class actions to the federal courts will choke federal court dockets and delay or foreclose the timely and effective determination of federal cases already properly before the federal courts, in addition to the newly directed cases."[52]

Moreover, as the Lawyers Committee noted, the principal motivation by the American Tort Reform Association in advocating this legislation would appear to be to remove the cases from jury pools that are composed largely of minorities and those with low incomes. Their report entitled "Bringing Justice to Judicial Hellholes 2002" identifies thirteen counties/jurisdictions that it describes as "hellholes," where it claims the rules are not applied fairly to defendants. Although no criteria is put forth to distinguish which jurisdictions may meet the "hellhole" threshold, almost all of the jurisdictions have populations in which people of color constitute majorities or near majorities, and others have populations with disproportionately low incomes.[53]

While devastating to civil rights plaintiffs generally, the legislation is even more harmful to workers with wage and hour claims. Often, dozens of employees bring one lawsuit together in state courts, where state wage and hour laws typically provide more complete remedies for victims of such violations than the federal statute. For example, the federal Fair Labor Standards Act (FLSA) offers no protection for a worker who worked 30 hours and is paid for 20, so long as the worker's total pay exceeds minimum wage. But many states have laws requiring the worker to get paid for the full extent of his or her work. State laws are often better for workers who work overtime.

States also tend to protect civil rights better than the federal statutes like the Americans with Disabilities Act or the Age Discrimination in Employment Act. They often provide broader definitions of disability; twenty states provide protection for marital status; 21 states extend federal definitions of national origin discrimination by including ancestry, place of birth, or

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acid compound, leaked from General Chemical's Richmond, California plant when a valve malfunctioned during unloading. A cloud of chemicals formed over a heavily-populated community in North Richmond, and over 24,000 people sought medical treatment in the days immediately following the leak. Individual plaintiffs received up to $3,500 in compensation.

[52]*Class Action Fairness Act of 2003: Hearings on H.R. 1115 before the House Comm. on the Judiciary*, 108th Cong.(2003) [hereinafter "Henderson Testimony"] (written testimony of Thomas Henderson, Chief Counsel, Lawyers' Committee for Civil Rights Under Law).

[53]Lawyers' Committee for Civil Rights Under Law, *The Impact of the "Class Action Fairness Act" on Civil Rights Cases* (2003).

citizenship status; and 31 states prohibit genetic discrimination in the workplace.

Under S. 5, these cases, brought by citizens of a state, under state wage and hour and civil rights laws, against a defendant with hundreds of employees in that state, will be moved to federal court. And as stated above, once in federal court, these cases will suffer delay and will likely fail to be certified.

Senator Kennedy offered an amendment in the Senate to exempt these cases from the bill, but was defeated. The amendment was supported by groups such as the Leadership Conference on Civil Rights, Alliance for Justice, AARP, ACLU, American Federation of State, County & Municipal Employees, American Federation of Teachers, Communications Workers of America, and International Brotherhood of Teamsters, among others.[54]

F. The So-Called "Consumer Class Action Bill of Rights" Does Not Help Consumers

The portion of the bill that claims to help consumers, the so-called "Consumer Class Action Bill of Rights,"[55] actually does little or nothing to help consumers, and is detrimental to civil rights cases.

The most highly touted portion of S. 5 is Section 1712, which purports to address inequities in coupon settlements.[56] Proponents of the bill assert that there is widespread misuse of these settlements, allowing plaintiff's attorneys to recoup large fees while class members are left with nothing more than a coupon for the defendant's product. It should be noted at the outset that coupon settlements are traditionally favored by defendants.[57] More importantly, section 1712 does nothing to address the problem. Under the legislation, a coupon settlement may be approved only after a court finds that the settlement is "fair, reasonable, and adequate" for class members.[58] This is identical to the universal settlement approval standard applicable to all cases, which requires a court to issue a written finding that a settlement is "fair, adequate, and

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[54]*See* Civil Rights and Labor Groups Letter, *supra*.

[55]S. 5, § 3.

[56]S. 5, § 3, proposed 28 U.S.C §1712.

[57]Wolfman, pps. 18-19 ("[D]efendants love coupon settlements in which the coupon will have little or no value. The settlement provides a modest marketing gimmick for the defendants' products, while ridding the defendants of potentially troublesome litigation for little more than the cost of attorneys fees.")

[58]S. 5, § 3, proposed 28 U.S.C §1712.

reasonable."[59] Thus, in the area of coupon settlements – the area most cited by proponents to justify this legislation–the bill does nothing to alter or improve current law.

S. 5's provision for notification to class members is another area where the burden far outreaches the benefit.[60] It requires that federal and state regulators, including attorneys general, be notified of proposed class action settlements. They must also receive copies of the complaint, class notice, and proposed settlement. Not only does this provision lack meaning–as these materials will unlikely reveal evidence of collusive settlements between defendants and plaintiffs' counsel–it is burdensome as well. Moreover, it will mislead class members to believe "that their interests are being protected by their government representatives, simply because the notice was sent to the Attorney General of the United States, State Attorneys General and other federal and state regulators."[61]

II. S. 5 WILL DAMAGE THE FEDERAL AND STATE COURT SYSTEMS

A. Impact on Federal Courts

Expanding federal class action jurisdiction to include most state class actions, as S. 5 does, will inevitably result in a significant increase in the federal courts' workload. As the Judicial Conference has noted: "the provisions would add substantially to the workload of the federal courts and are inconsistent with federalism."[62]

In actuality, the workload problem in the federal courts continues to be severely problematic. For example, in 2004, the situation of the federal courts was as follows:

- As of the end of the 108th Congress, 35 judicial vacancies existed.[63]
- The number of filings in the U.S. District courts per on-board active judge was 502. Pending civil cases rose 6 percent (up 13,987 cases) to 264,487 since 2003,

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[59]Wolfman p. 19.

[60]S. 5, §3, proposed Section 1715.

[61]*See* Feb. 7, 2005 State AG letter, *supra*.

[62]Mecham letter, p.2.

[63]Judicial Nominations, Department of Justice, Office of Legal Policy, *available at* <http://www.usdoj.gov/olp/judicialnominations.htm> (last viewed Feb, 14, 2005).

and 19.7 percent since 1995[64]

Because of these and other workload problems, Chief Justice Rehnquist took the important step of criticizing Congress for taking actions that have exacerbated the courts' workload problem:

> I also criticized Congress and the president for their propensity to enact more and more legislation which brings more and more cases into the federal court system. This criticism received virtually no public attention. . . .[I]f Congress enacts, and the president signs, new laws allowing more cases to be brought into the federal courts, just filling the vacancies will not be enough. We will need additional judgeships.

S. 5 would result in the removal of most state court class actions into federal court. The federal courts have fewer than 1,500 judges compared to more than 30,000 judges currently serving on state courts. The number of federal civil cases pending for three years or more has doubled since 1999 to more than 34,000. While nobody knows the precise number, there are thousands of class action lawsuits pending in state courts around the country that would be added, even if temporarily, to the federal docket under S. 5.

Class actions are among the most complex and time-consuming cases that courts must decide. In fact, studies have shown that class actions on average consume almost five times more judicial time than the typical civil case. Adding thousands of resource-intensive state cases to the federal courts would place additional stresses and demands on an already overburdened system. Compounding the federalism problem, these new federal cases will involve issues of primarily state law, with which state court judges are familiar and federal judges are not.

This would result in federal judges having less time to devote to the additional class actions, as well as to their existing caseloads. Class action lawsuits and settlements would receive even less careful judicial supervision than they receive today, potentially leading to court approval of even more collusive settlements, not fewer. In addition, growing caseloads will delay justice in class actions as well as in other federal court cases. Finally, overburdened judges may be more likely to dismiss class action claims in order to clear their dockets, even in meritorious cases.

B. Impact on State Courts

In addition to these workload problems, the legislation raises constitutional issues. S. 5 does not merely operate to preempt an area of state law, it also unilaterally strips the state courts of their ability to use the class action procedural device to resolve state law disputes. As the Conference of Chief Justices stated, the legislation in essence "unilaterally transfer[s]

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[64] *See Admin. Office of the U.S. Courts, Judicial Caseload Indicators, available at <http://www.uscourts.gov/caseload2004/front/judbus03.pdf>*

jurisdiction of a significant category of cases from state to federal courts" and is a "drastic" distortion and disruption of traditional notions of judicial federalism.[65]

In this regard, the courts have previously found that efforts by Congress to dictate state court procedures implicate important Tenth Amendment federalism issues and should be avoided. For example, in *Felder v. Casey*[66] the Supreme Court observed that it is an "unassailable proposition .... that States may establish the rules of procedure governing litigation in their own courts." Similarly in *Johnson v. Fankell*[67] the Court reiterated what it termed "the general rule 'bottomed deeply in belief in the importance of State control of State judicial procedure . . . that Federal law takes State courts as it finds them'"[68] and observed that judicial respect for the principal of federalism "is at its apex when we confront a claim that Federal law requires a State to undertake something as fundamental as restructuring the operation of its courts" and "it is a matter for each State to decide how to structure its judicial system."[69]

The Supreme Court's most recent decisions further indicate that S. 5 is an unacceptable infringement upon state sovereignty. In *United States v. Morrison*[70], the court invalidated parts of the Violence Against Women Act, claiming that Congress overstepped its specific constitutional power to regulate interstate commerce. Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially warned Congress not to extend its constitutional authority to "completely obliterate

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[65]*See* Chief Justices letter, *supra*.

[66]487 U.S. 131, 138 (1988) (finding Wisconsin notice-of-claim statute to be preempted by 42 U.S.C. § 1983, which holds anyone acting under color of law liable for violating constitutional rights of others).

[67]520 U.S. 911 (1997) (holding that Idaho procedural rules concerning appealability of orders are not preempted by 42 U.S.C. §1983).

[68]*Id*. at 919 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

[69]*Id.* at 922. *See also* Howlett v. Rose, 496 U.S. 356, 372 (1990) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 508 (1954) for the proposition that federal law should not alter the operation of the state courts); New York v. United States, 505 U.S. 144, 161 (1992) (stating that a law may be struck down on federalism grounds if it "commandeer[s] the legislative processes of the States by directly compelling them to enact and enforce a Federal regulatory program"); Printz v. United States, 117 S.Ct. 2365 (1997) (invalidating portions of the Brady Handgun Violence Protection Act requiring local law enforcement officials to conduct background checks on prospective gun purchasers).

[70]529 U.S. 598 (2000).

the Constitution's distinction between national and local authority."[71] S. 5 ignores the Court's admonition and subverts the federal system by hindering the states' ability to adjudicate class actions involving important and evolving questions of state law.

These same constitutional concerns were highlighted by Professor Laurence Tribe in his testimony during the 105th Congress regarding the constitutionality of certain aspects of tobacco legislation, including a proposed federal class action rule applicable to state courts. He observed, "[f]or Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims -- to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits -- would raise serious questions under the Tenth Amendment and principles of federalism."[72]

Arguments that the bill is nonetheless justified because state courts are "biased" against out-of-state defendants in class action suits also lack foundation.[73] First, the Supreme Court has already made clear that state courts are constitutionally required to provide due process and other fairness protections to the parties in class action cases. In *Phillips Petroleum Co. v. Shutts*,[74] the Supreme Court held that in class action cases, state courts must assure that: (1) the defendant receives notice plus an opportunity to be heard and participate in the litigation;[75] (2) an absent plaintiff must be provided with an opportunity to remove himself or herself from the class; (3) the named plaintiff must at all times adequately represent the interests of the absent class members; and (4) the forum state must have a significant relationship to the claims asserted by each member of the plaintiff class.[76]

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[71] *Id*.

[72] *The Global Tobacco Settlement: Hearings Before the Senate Comm. on the Judiciary*, 105th Cong., (1997) (statement of Laurence H. Tribe, Tyler Professor of Law, Harvard Law School).

[73] Of course the entire premise of the argument would need to be based on bias by the judges, since the juries would be derived from citizens of the state where the suit is brought, whether the case is considered in state or federal court.

[74] 472 U.S. 797 (1985).

[75] The notice must be the "best practicable, reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 812 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950)).

[76] *See id.* at 806-810. These findings were reiterated by the Supreme Court in 1995 in *Matshusita Elec. Indust. Co. v Epstein*, 516 U.S. 367 (1995) (state class actions entitled to full faith and credit so long as, *inter alia*, the settlement was fair, reasonable, and adequate and in the best interests of the settlement class; notice to the class was in full compliance with due process;

Second, as fears of local court prejudice have subsided and concerns about diverting federal courts from their core responsibilities have increased, the policy trend in recent years has been towards *limiting* federal diversity jurisdiction.[77] For example, recently Congress enacted the Federal Courts Improvement Act of 1996,[78] which *increased* the amount in controversy requirement needed to remove a diversity case to federal court from $50,000 to $75,000. This statutory change was based on the Judicial Conference's determination that fear of local prejudice by state courts was no longer relevant[79] and that it was important to keep the federal judiciary's efforts focused on federal issues.[80] In this same regard, the American Law Institute has found "there is no longer the kind of prejudice against citizens of other states that motivated the creation of diversity jurisdiction."[81] And finally, the most recent Federal Courts Study Committee report on the subject concluded that local bias "is no longer a major threat to litigation fairness" particularly when compared to other types of prejudice that litigants may face, such as on account of religion, race or economic status.[82] Indeed, in 1978, the House twice

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and the class representatives fairly and adequately represented class interests).

[77]Ironically, during the 105th Congress, the Republican Party was extolling the virtues of state courts in the context of their efforts to limit *habeas corpus* rights, which permit individuals to challenge unconstitutional state law convictions in federal court. At that time Chairman Hyde stated:

> I simply say the state judge went to the same law school, studied the same law and passed the same bar exam that the Federal judge did. The only difference is the Federal judge was better politically connected and became a Federal judge. But I would suggest ... when the judge raises his hand, State court or Federal court, they swear to defend the U.S. Constitution, and it is wrong, it is unfair to assume, *ipso facto*, that a State judge is going to be less sensitive to the law, less scholarly in his or her decision than a Federal judge.

142 Cong. Rec. H3604. (daily ed. April 18, 1996).

[78]28 U.S.C. § 1332(a) (West Supp. 1998).

[79]The Judicial Conference of the United States, Long Range Plan for the Federal Courts, Recommendation 7 at 30 (1995).

[80]*Id.*

[81]American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 101, 106 (1996).

[82]Federal Courts Study Committee, Report of the Federal Courts Study Committee 40 (April 2, 1990). *See also*, Ball, *Revision of Federal Diversity Jurisdiction*, 28 Ill. L. Rev. 356 (1988); Bork, *Dealing with the Overload in Article III Courts,* 1976, 70 F.R.D. 231, 236-237 (1976); Butler & Eure, *Diversity in the Court System: Let's Abolish It*, 11 Va.B.J. 4, (1995); Coffin,

passed legislation that would have abolished general diversity jurisdiction.[83]

Third, as the legislation is currently written, it assumes a defendant will be automatically subject to prejudice in any state where the corporation is not formally incorporated (typically Delaware) or maintains its principal place of business. In so doing, the bill ignores the fact that many large businesses have a substantial commercial presence in more than one state, through factories, business facilities or employees. For example, if General Motors or Ford were to be sued by a class of plaintiffs in Ohio, where they have numerous factories and tens of thousands of employees, it does not seem reasonable to expect the defendants to face any great risk of bias.[84] Similarly, if the Disney Corporation, one of Florida's largest employers, were to face a class action in a Florida court, it would make little sense to involve the federal courts out of concern for local prejudice.[85] Yet under S. 5, both of these hypothetical cases would be subject to removal to federal court.[86]

It is for these reasons that the State courts believe that the enactment of the legislation goes against the underlying judicial principles of our system of government. Specifically, the

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Judicial Gridlock: The Case for Abolishing Diversity Jurisdiction, 10 Brookings Rev. 34 (1992); Currie, *The Federal Courts and the American Law Institute*, 36 U. Chi. L. Rev. 1, 1-49 (1968); Feinberg, *Is Diversity Jurisdiction An Idea Whose Time Has Passed?*, N. Y. St. B. J. 14 (1989); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Corn. L. Q. 499 (1928); Frankfurter, *A Note on Diversity Jurisdiction – In Reply to Professor Yntema*, 79 U. Pa. L. Rev. 1097 (1931); Haynsworth, Book Review, 87 Harv. L. Rev. 1082, 1089-1091 (1974); Hunter, *Federal Diversity Jurisdiction: The Unnecessary Precaution*, 46 UMKC L. Rev. 347 (1978); Jackson, *The Supreme Court in the American System of Government*, 38 (1955); Sheran & Isaacman, *State Cases Belong In State Courts*, 12 Creighton L. Rev. 1 (1978).

[83]*See* 124 Cong. Rec. 5008 (1978); 124 Cong. Rec. 33, 546 (1978). The legislation was not considered in the Senate.

[84]General Motors and Ford both have their principal place of business in Michigan and are incorporated in Delaware.

[85]Disney's corporate headquarters are located in Burbank, California, and it is incorporated in Delaware.

[86]With increasing frequency, companies are setting up paper companies in places like Bermuda for a nominal fee. The company continues to be owned by the U.S. shareholder and continues to do business in the exact same U.S. locations. This allows the company to escape substantial tax liability and possibly avoid legal liability. To stop this abuse, Representatives Conyers and Jackson-Lee offered an amendment at the Judiciary Committee markup, which would allow former U.S. companies to be treated as domestic corporations for class action purposes. This amendment was defeated by a vote of 20-13.

Conference of Chief Justices said in a letter opposing a predecessor version of the bill, "So drastic a distortion and disruption of judicial federalism is not justified, absent clear evidence of the inability of the state judicial systems to process and decide class action cases in a fair and impartial manner and in timely fashion."[87]

CONCLUSION

S. 5 will remove class actions involving state law issues from state courts -- the forum most convenient for victims of wrongdoing and with judges most familiar with the substantive law involved -- to the federal courts, where the class is less likely to be certified and the case will take longer to resolve. This incursion into state court prerogatives is no less dangerous to the public than many of the radical forms of "tort reform" and "court stripping" legislation previously rejected by the Congress.

Contrary to supporters' assertions, S. 5 will not prevent state courts from unfairly certifying class actions without granting defendants an opportunity to respond. This is already barred by the Constitution, and the few state trial court decisions to the contrary have been overturned.[88] S. 5 also cannot be seen as merely prohibiting nationwide class actions filed in state court. The legislation goes much further and bars state class actions filed solely on behalf of residents of a single state and that solely involve matters of that state's law, so long as one plaintiff resides in a different state than one defendant–an extreme and distorted definition of diversity which does not apply in any other legal proceeding.

This legislation will seriously undermine the delicate balance between our federal and state courts. It threatens to overwhelm federal courts by causing the removal of resource intensive state class action cases to federal district courts while also increasing the burdens on state courts as class actions rejected by federal courts metamorphasize into numerous additional individual state actions.

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[87]Letter from Chief Justice David A. Brock, President of the Conference of Chief Justices to Congressman Henry J. Hyde, Chairman of the Committee on the Judiciary (July 19, 1999) (on file with the House Judiciary Committee Democratic Staff).

[88]*See* Ex Parte State Mut. Ins. Co., 715 So.2d 207 (Ala. 1997); *Ex Parte Am. Bankers Life Assurance Co. of Florida*, 715 So.2d 207 (Ala. 1997) (holding that classes may not be certified without notice and a full opportunity for defendants to respond and that the class certification criteria must be rigorously applied).